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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATER COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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OPINIONS BELOW.

The opinion of the District Court is reported at 107 F. Supp. 453, and appears in Vol. I of the Record, page 143a. The opinion of the Circuit Court is reported at 216 F. 2d 749, and appears in Vol. I of the Record, page 190a.

JURISDICTION.

The judgment of the Court of Appeals was entered November 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

I.

Is a common buying agent, having the sole and exclusive right to negotiate and contract for the licensing of motion pictures for exhibition in a large number of thea-

ters, most of which are in closed or non-competitive situations, and which is a substantial and generally the largest customer of the motion picture distributors in its area, bereft of unreasonable trade restraining potential and circuit buying power because there is absent a thread of common ownership among such theaters?

II.

May such common buying agent, in concurrent negotiations for the buying and licensing of films with motion picture distributors, join both its many non-competitive or closed situation theaters and its competitive or open situation theater, which is in opposition to an independently owned theater desirous of negotiating for such films, without transgressing the Anti-Trust Act?

STATUTES INVOLVED.

15 U. S. C. Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or

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the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. Sec. 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

15 U. S. C. Sec. 7. "Person" defined.

The word "person," or "persons," wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by

the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U. S. C. Sec. 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE.

This is a private anti-trust suit brought under favor of the Federal Anti-Trust Acts. Misuse of buying power by a motion picture buying combine is the predicate for this action. Trial was had to the Court. (Freed, *J.*) Judgment was entered for respondents. The Court of Appeals for the Sixth Circuit affirmed.

Petitioner is a corporation. From October 1, 1937 until March 18, 1950 it was the lessee of a motion picture theater called the Moreland, in Cleveland, Ohio. Inherently competitive with the Moreland was another theater called the Regent, located on the opposite side of the street about 500 feet from the Moreland. Each had approximately 1500 seats. The Regent was operated by respondent Regent Theatre Company, dominated and controlled by respondent Gusdanovic. In November, 1929, less than two years after the Moreland was opened, Gusdanovic organized the Moreland Theater Company, all of the stock

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of which was owned by respondent Regent Theatre Company. The Moreland Theater Company bought the then-existing lease on the Moreland Theater and operated it until October 1, 1937. This was done, said Gusdanovic, "in order to avoid competition" (R. I, p. 127a). Despite asserted losses in the operation of the Moreland, in 1937 Gusdanovic sought to renew the lease on that theater in order, as he again put it, to "avoid the competition and fights" (R. I, p. 97a).

Respondent, Gusdanovic, from 1926 on, has been the chief stockholder and possessor of the chief financial interest in and has dominated and controlled the policies and activities of respondents The Regent Theatre Company, Cranwood Theater Company, Cinema Service Corporation, and East Shore Theater Company, hereinafter called "exhibitor-respondents." He also owned the building which housed the Regent theater.

On February 23, 1938, about five months after petitioner took over operation of the Moreland, respondent Cooperative Theaters of Ohio, Inc., hereinafter called "Cooperative," was incorporated. On March 18, 1938, three weeks after Cooperative was incorporated, exhibitor-respondents became original members of it. Cooperative's purpose clause recites that it was formed:

> "to develop, establish and conduct a centralized system for the booking and distribution of available motion pictures."

Each theater owner which engaged Cooperative and became a member thereof vested in it:

> "the sole and exclusive right to select, negotiate for, bargain for, buy, lease, rent, contract for and book all motion pictures exhibited"

in his respective theater. Respondent Milton A. Mooney is the central figure in the activities of Cooperative.

Respondents Twentieth Century Fox Film Corporation, Loew's Incorporated, Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), and Universal Film Exchanges Inc. are corporations engaged in the business of licensing and distributing motion picture films. These respondents, hereinafter referred to respectively as "Fox," "Loew's" or "Metro," "Warners" and "Universal," together constitute the "distributor-respondents."

Distributor-respondents are four of the so-called eight major distributing companies. There are comparatively few sources of suitable product. The eight major film companies provide the great bulk of the suitable product. The films of these companies attract a substantial majority of motion picture theater patrons.

The number of features released by these distributors during the damage period with which we are concerned varied from 248 to 399 per season and in recent seasons has not exceeded 300 features per season, including Westerns and re-issues.

Gusdanovic operated the Regent generally on a three-changes per week, double-bill policy. The Moreland felt impelled and tried, in general, to follow suit. In such a situation, good box office product became a commodity in scarce supply. The product of the four distributor-respondents represents pretty much the cream of the product available for exhibition. The lower court, in its opinion, recited that:

> "there was convincing testimony during the trial to the effect that the Moreland could not exist if it were forced to play all the films of the four distributor-defendants on a run subsequent to that of the Regent. There is the focal point of this case. If the Moreland could not exist on a run behind the Regent, so, also,

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must it be true that the Regent could not exist on the same run behind the Moreland" (R. I, p. 151a).

Petitioner's complaint is based on the misuse of buying power generated by the centralization and concentration in Cooperative of the right to buy or lease films for exhibition in a large number of motion picture theaters, the vast majority of which are located in theater-operating-areas where each such theater does not have any competition from any theater showing films on the same run. Such a theater is commonly known as a closed situation. The closed situation is a monopoly situation. The buyer for such a situation possesses the only key which will unlock the run in the given theater-operating-area to a distributor.

A closed situation also arises where there are two inherently competitive theaters in the same theater operating area and each is controlled or owned by the same entity or the buying for each is done by the same buyer (R. I, pp. 52a, 53a). From November 1929 until October 1, 1937, when the Moreland-Regent situation was a closed one, Gusdanovic was able to determine in which theater product should be played. He exhibited the "cream of the product," that distributed by distributor-respondents, in the Regent Theater housed in his own building. He thus held undisputed market control in that theater-operating-area.

The philosophy of Mooney, Cooperative's central figure, and Gusdanovic, was that to the product distributed by distributor-respondents, Gusdanovic and the Regent had acquired a vested right because such product had been exhibited in the Regent theater prior to 1937. This is best demonstrated in Mooney's own language. When defendant "Metro" in 1946 went to competitive bidding between the Moreland and the Regent for its product,

Mooney, in protest, stopped buying any Metro product for any of the Cooperative Theaters (R. I, pp. 89a-92a). He explained his position thus, "Well, I believe that The Regent Theater was the old customer and had been playing product for many years and that they were entitled to all of the Metro product" (R. I, p. 128a). Again in 1946, Schmertz, Fox Branch Manager, in writing to his superior in New York of his difficulties in negotiating with Mooney, reported,

> *"He [Mooney] also told me we dare not sell any of his opposition houses, and that the pictures are his, yet he won't buy them."* (R. I, pp. 39a, 40a.)

When Gusdanovic became an original member of Cooperative, Mooney promised him that he would try to keep for the Regent the product which the Regent had at that time (R. I, p. 50a). He made the same kind of promise to each exhibitor upon joining Cooperative (R. I, p. 50a).

By 1938 Mooney was already an experienced motion picture man. Early in his career he joined respondent Warners. He was branch manager of its Cleveland exchange from some time in the 1920's until January, 1938. He entered the exhibition field in 1924 as the operator of motion picture theaters in Bellefontaine, Ohio. At first he was without competition. In 1930 he was subjected to the large scale and monopoly buying power of the Schine Circuit, later itself the object of a successful government action for violation of the Sherman Act (*Schine Chain Theatres v. United States* (334 U. S. 110, 68 S. Ct. 947, 92 L. Ed. 1245 (1948)). He soon found himself without suitable product and he sold out to Schine at an appreciable loss. Mooney testified for the government in its action against Schine.

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Mooney was thoroughly familiar with large scale and monopoly buying power. He knew, as he put it, that such power could enable a large circuit or aggregation of theaters to "throw a club around and get product in every situation, every deal they wanted" (R. I, p. 7a) and that where a circuit theater had competition, it became important that the circuit get the cream of the product for that theater (R. I, p. 8a).

Mooney early urged Cooperative members to refrain from talking business with film salesmen in order to "build up and strengthen our buying power" (R. I, p. 5a). When one of Cooperative's members violated this admonition, she was compelled to resign.

Cooperative started with twenty-two theaters. By September, 1938 it consisted of twenty-nine theaters. In 1938, the next largest circuit to Cooperative in its exchange area in number of theaters consisted of "13 or 14 theaters." Cooperative grew steadily until, in 1949, it was buying for 141 theaters. The following table shows its year by year growth as of September 1st of each year, until plaintiff went out of business:

1938	29	1944	67
1939	32	1945	76
1940	35	1946	103
1941	42	1947	120
1942	48	1948	136
1943	60	1949	141

From its beginning, there was no circuit or group of theaters in the Cleveland exchange area which exceeded Cooperative in the number of theaters for which such circuit or group bought product. In September, 1949, only six months before petitioner was forced to close the doors of the Moreland, Cooperative was buying product for five

and one-half times as many theaters as the next largest buyer of product for theaters in this exchange area.

Certain of the distributor-respondents kept circuit sales performance records. Cooperative was listed in such records. Circuit sales performance records of respondent Universal show that Cooperative provided Universal with from 20 to 25% of its total circuit billings in this exchange area, more than any other single circuit.

The following table shows the five largest circuit buyers of product from Universal in terms of revenue for each of the periods indicated.

Year-ending	10-30-47	10-30-48	10-29-49	11-1-49 to 3-18-50
Cooperative	$160,614.64	$131,392.50	$153,447.22	$39,089.10
Loew's	9,859.49	94,829.08	108,502.36	11,826.02
Warners	150,554.32	72,135.09	111,113.77	24,714.70
Schine	47,696.56	59,017.11	52,387.62	12,015.93
Shea	26,302.60	30,146.40	34,972.31	11,830.72

The following table, furnished by Warners, lists the five largest buyers of its product in terms of revenue for each of the periods indicated, omitting Warners own circuit.

Year-Ending	9-1-44	9-1-45	8-30-46	8-29-47	8-29-48	8-27-49
Cooperative	$93,270.53	$120,875.81	$136,131.44	$165,765.10	$200,354.17	$217,720.62
R.K.O.	78,188.90	78,711.74	115,185.59	54,439.07	33,835.60	27,233.82
Schine	58,675.92	59,913.92	73,601.76	72,499.17	73,623.29	74,002.74
Associated	56,326.00	71,287.06	68,916.67	41,281.21	61,689.82	111,117.88
Skirball	50,139.66	51,150.80	51,370.25	57,578.39	58,021.49	52,049.33

Cooperative provided Warners with from approximately 17% to 24% of its total billings in this exchange area exclusive of Warners own theaters. This was more revenue than was provided by any other single circuit save its own which operated, in the main, first run theaters in the larger cities.

Cooperative furnished Fox with from approximately 8% of its total film rentals in the 1942-1943 season to approximately 14% of such total beginning with the 1944-1945 season. This was more than any other single circuit

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beginning with the 1944-1945 season. In prior seasons, the Fox revenue from Cooperative was exceeded only by that from Warners for the seasons 1939-1940, 1941-1942 to 1943-1944 (inclusive) and that from Shea in the seasons 1941-1942 and 1942-1943.

Loew's kept no circuit sales performance records. Cooperative, however, provided Loew's with about 12½% of its total business including revenue from its own circuit, whose theaters, for the most part, play first runs in large cities (R. I, p. 92a).

Cooperative, said Zucker (Universal), was "possessed of considerable buying power" (R. I, p. 62a). He testified he

> "never considered selling to the Moreland Theater * * * for the simple reason that I approached Mr. Mooney because of the fact that he represented a potential—an important source of income." (R. I, p. 61a.)

Zucker's superior, Dana, described Cooperative as a "buying combination for a number of theaters * * * important in amount of money."

On December 13, 1938, Mooney told Cooperative members that "we have two theaters in our group who had to contend with opposition, namely the Regent and Lincoln Theaters in Cleveland, which fact is very important as all exchanges need every situation of the remaining number." This meant that more than 90% of the theaters in Cooperative at that time were non-competitive or closed situations.

Branch managers of the several distributor-defendants testified anent the number of non-competitive or closed situations for which Cooperative bought their product. Zucker (Universal) said the majority of such situa-

tions were "non-competitive," that "somewhere about five or six were competitive" (R. I, p. 53a). Wechsler (Warners) said that of the situations for which Mooney bought Warner product, ten or twelve were "competitive," that the "great majority" of the situations for which Cooperative buys are "non competitive" (R. I, p. 64a). Sogg (Loew's) testified that the "majority" of situations for which Cooperative bought Loew's product were "non-competitive," that, for instance, in the year 1946-47, "about 15% were competitive" (R. I, p. 82a). Schmertz (Fox) said that a number of the Cooperative Theaters were "closed situations" (R. I, p. 25a).

The rentals at which pictures are sold for particular theaters fall generally into price levels corresponding to the likely box office appeal of the picture. These price levels are called "brackets," "allocations" or "classifications" and generally are determined for each theater at the beginning of the season. The number of brackets for one theater may differ from that of another theater, but generally speaking, brackets are more or less similarly designated by the particular distributor. Brackets are identified either by number or letter.

Negotiations generally revolve about a form called a deal sheet. The name and location of each theater in the Cooperative Circuit, arranged in alphabetical order, appears on the left hand side of this form. Across the top are spaces for insertion of the names of the pictures. Spaces or boxes are provided for the insertion of prices.

The pattern of negotiating a deal with Mooney was generally the same for all defendant-distributors whether the contracts signed were individual contracts for each theater or a contract for the exhibition of a number of pictures in many theaters. No distinction is made on the

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deal sheets between open and closed situations. For example, Zucker (Universal) always employed a deal sheet such as has been heretofore described. His practice was to fill out the entire deal sheet in advance of his visit to Mr. Mooney (R. I, pp. 54a-55a). Subject to minor exceptions occasioned by conditions peculiar to a particular situation at the moment, or the nature of the picture with relation to a particular situation, negotiations with Mooney revolved about the allocation into which the particular picture had been put (R. I, pp. 55a-56a).

Pictures often were sold to Cooperative on the same over-all basis as a picture previously exhibited. Mere mention of the total amount involved in a deal will frequently permit a contract clerk to set up the allocation price opposite each theater in the deal, "because," as Lapidus, Eastern sales manager for Warners put it, "that particular amount represents a certain allocation" (R. I, p. 136a).

When the deal sheet is filled out with prices representing brackets mutually agreed upon between the branch manager or his superior and Mooney, acting for Cooperative, a contract or contracts are drawn up and submitted to New York for approval. The deal is subject to New York approval. Sales executives in New York are kept apprised of developments and before the deal is finally accepted, the entire projected deal with Cooperative is presented to such sales executive. Sometimes the deal sheets are sent to New York to show "how the deal was set up before it was accepted by Mooney" (R. I, p. 70a).

Whatever difficulties arose to block a projected deal for the Cooperative Circuit, no matter how unreasonable or obstinate Mooney became, howsoever long consummation of the deal was delayed, there was never any effort by the distributor to sell the picture to the petitioner in the Moreland-Regent situation.

From 1938 until virtually 1947, save for few isolated instances, petitioner was deprived of the product of all four distributor-defendants, though it sought continually the opportunity to negotiate for such product. It was not until virtually the beginning of 1947 that the petitioner was accorded an opportunity to bid for Metro product. Before Metro went to bidding in the Moreland-Regent situation, its branch manager in Cleveland was asked by his home office to write up a specific comparison of the two theaters as of that time. He recorded his observations and his conclusions. He then wrote:

> "The appointments of both theaters are good and both properties are kept in good condition."
>
> * * *
>
> "Our business dealings with both of these accounts have been very good and they have always fulfilled their obligations." (R. I, p. 84a.)

On December 27, 1946 after Metro went to bidding in the Moreland-Regent situation, Mooney wrote to Metro:

> "If it is Metro's policy to permit the theatres to pay exorbitant prices in order to build up the house for sale, we cannot compete. As you know, this house has been for sale for many years and if other companies join Metro in auctioning off their pictures between the Moreland and Regent Theatres, he naturally will be able to get a high price for this theatre." (Pl. Ex. 15.)

The crucial finding of fact by the Trial Court from which the judgment entered necessarily followed, reads:

> "Neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power in the negotiation for or licensing of films for the Regent from the distributor-defendants." (Finding of Fact No. 85, R. I, 180a.)

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Patently, if neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power and lacked unreasonable trade restraining potential, there could be no transgression of the Anti-Trust Act as alleged by petitioner.

The Trial Court's reasoning is found in the following language in its opinion (R. I, pp. 153a-156a):

> "While it is true that Cooperative represented a considerable number of exhibitors who comprised the local film market, that fact does not in and of itself establish that Cooperative actually possessed the trade restraining potential attributed to it, nor that Mooney was, thus, enabled to 'throw his weight around' to the extent necessary to cause the distributor-defendants to grant him a preferential right-of-way in local film traffic. There is nothing inherently unlawful in the acquisition and retention of a great volume of purchasing power. It is only when that power is used in such a manner as to further an unlawful restraint of trade that the yielder of the power runs afoul of the Sherman Act. *United States v. Griffith, supra.* Therefore, in the absence of oppressive or coercive exercise of Cooperative's *admitted buying potential,** the distributor-defendants were perfectly free to exercise their general right of customer selection with respect to the Regent or any other theater similarly situated, whether or not the theater ultimately selected was represented by a film purchasing agent.
>
> * * * * *
>
> The evidence here does not substantiate the contention that Cooperative used its representation of noncompetitive theaters to exact the preference of the Regent over the Moreland, despite the fact that Mooney often carried on negotiations with the distributor-defendants for all of Cooperative's customer

* Emphasis added throughout unless otherwise noted.

theaters at one time. The mere representation by Cooperative of both competitive and noncompetitive clients, in a single negotiation, does not *per se* violate the mandate of 'picture by picture' and 'theater by theater' dealing.

* * * * *

Compelling logic, in this Court's view, directly refutes the plaintiff's contention that Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland. It is to be seriously doubted that an individual theater owner in a noncompetitive situation would suffer his position to be used in a manner, which may work to his detriment, as an instrument for obtaining the preferential treatment of an exhibitor with whom he had no particular connection other than the fact that they were both represented by Cooperative. To the contrary, it is more likely that he should object vigorously to such treatment, even to the point of refusing to purchase the services of Cooperative in the future."

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The lower courts in this case have held that a common buying agent of the nature with which we are here concerned has no monopoly power and no trade restraining potential; that though possessed of a "great volume of purchasing power," though it "often carried on negotiations with the distributor-defendants for all of (its) customer theaters at one time * * * in a single negotiation * * *" joining its many non-competitive situations with its competitive situation in negotiation for product, such conduct cannot run afoul of the Anti-Trust Act.

Such views therefore hold that a buying combine composed of theaters without common ownership can do with immunity what the United States Supreme Court

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has held a buying combine with common ownership cannot do without running afoul of the Anti-Trust Act. *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944); *United States v. Griffith, et al.*, 334 U. S. 110 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); *United States v. Paramount, et al.*, 334 U. S. 131 (1948). Is the mere absence of common ownership a valid and sufficient ground for such immunity? Petitioner submits that it is clear and implicit in the pronouncements of this Court that no such ground is valid.

In *Paramount*, this Court was concerned with discriminatory practices in the distribution of feature motion pictures in violation of the Federal Anti-Trust Act, pertaining to circuits of theaters both affiliated and unaffiliated with the producers and distributors.

A circuit, as employed in the *Paramount* case, is defined in the complaint and approvingly referred to by the U. S. Supreme Court as a "group of more than five theatres controlled by the same person or *a group of more than five theatres which combine through a common agent in licensing films.*" *U. S. vs. Paramount Theatres Inc., et al.*, 334 U. S. 131, 155. Such a concept was even alleged by respondent Loew's by specific averment in its answer in the *Paramount* case.

The group of theaters, many times five in number, which combined through their common agent, Cooperative Theaters of Ohio, in licensing films plainly was a circuit within the meaning of the *Paramount* case. It was commonly referred to and recognized as such by distributor-defendants.

In *Paramount*, discriminatory practices condemned by the Court were found to violate the Federal Anti-Trust Act because they operated to prevent negotiation or bid-

ding for films "theater by theater" in competitive situations and therefore denied to an independent, small competitor an opportunity to obtain choice runs.

This Court used this language:

> "In the first place, they eliminate the possibility of bidding for films, theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first run, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. *In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theaters in closed towns with competitive situations.* The reasons have been stated in United States v. Griffith, and Schine Chain Theatres v. United States and need not be repeated here." (334 U. S. 131, 154, 155.)

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, the action was against a group of nine companies operating motion picture theaters in some seventy small towns and three distributors.

The decision in that case establishes, in essence, that in dealing with an aggregation of theaters including within it a number of closed situations, which make for monopoly power, a distributor does not have the right to do whatever he pleases in the making of agreements; that in dealing with such a circuit he must give due regard to the competitive effect that those agreements will have upon the ability or inability of independent theaters operating in opposition to circuit theaters to show the distributor's films in competition with the circuit aggregation theater or at least upon the independent's ability or inability to negotiate for the licensing of his films in competition with the circuit theater.

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In *United States v. Griffith*, 334 U. S. 110, the Supreme Court passed on an appeal from the dismissal of the action by the District Court on the merits. The District Court had found that the appellees had not compelled or attempted to "compel distributors to grant them privileges not granted their competitors or which gave them any substantial advantage over their competitors" and had found further no such purpose as existed in the *Crescent* case, *supra*, to use buying power to eliminate competition. It found that the pooling of buying power was for the sole purpose of obtaining more favorable terms.

This Court, reversing the District Court, says:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement." (334 U. S. 100, 105.)

The Court further stated:

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." (334 U. S. 100, 107.)

Referring to the lower court's finding that no specific intent or purpose to monopolize existed in the *Griffith* case, *supra*, the Supreme Court says:

> "A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses the strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade

weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. He need not be as crass as the exhibitors in United States v. Crescent Amusement Co., 323 U. S. 173, 89 L. Ed. 160, 65 S. Ct. 254, supra, in order to make his monopoly power effective in his competitive situations. *Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined.* When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.

"The consequences of such a use of monopoly power is that films *are licensed on a non-competitive basis in what would otherwise be competitive situations.* That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed." (334 U. S. 100, 107, 108.)

In *Schine Chain Theatres vs. United States,* 334 U. S. 110, the opinion recites:

"For the reasons stated in United States v. Griffith, the combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade

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and the use of monopoly power in violation of Section 1 and Section 2 of the Act." (334 U. S. 110, 116.)

The lower Court enjoined Schine from buying or booking product for theaters in which Schine has no financial interest. This was approved by the Supreme Court. And the final decree in the *Paramount* case enjoins each of the defendant-exhibitor affiliates of Warners, Fox and Loew's from

> "operating, booking or buying features for any of its theaters through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate." (C. C. H. Trade Reg. Rep. Par. 62,573.)

Even as the licensing in *Griffith*, despite absence of specific intent and despite the finding that the difficulties which beset the defendants' competitors there were the result of lawful competitive practices, was held tainted and in violation of the anti-trust laws because of the joinder in negotiations of open and closed situations, so, too, in the case at bar even were specific intent to restrain trade, build a monopoly and retain effective market control absent, yet the scheme of concurrent deal sheet negotiations for the open Regent situation and the other closed Cooperative situations, must have as a consequence the licensing of films on a non-competitive basis in what would otherwise be a competitive basis. In fact, as is conceded, the Moreland never was afforded the opportunity to compete with the Regent for the films of Fox, Universal and Warners and not until virtually 1947 was it afforded such an opportunity by Loew's.

The Trial Court viewed the use by Cooperative of its "admitted buying potential" to further the interest of its open situation as working a "detriment" upon the closed situation. Wherefore it was not likely that the closed

situation would tolerate such a use. Ergo "compelling logic," in the Trial Court's view, directly refuted the contention that "Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland."

The keystone of such a view is the assumption that refusal to buy product from a distributor for a monopoly, closed situation would work a detriment upon such situation. That is a fallacy. The monopoly, closed situation theater has a surplusage of product.

Therein lies the decisive difference between the monopoly, closed situation and the open situation. In the monopoly, closed situation, because there is adequacy of product, the exhibitor has an economic advantage over the distributor. In the competitive open situation, product in relation to outlets is in scarce supply and the distributor has an economic advantage over the exhibitor.

The buyer for the buying combine monopoly theater can find adequate product to substitute for the product which he refuses to buy for such theater from a particular distributor. He not only has a surplusage of product, but the need for quality of product is not so great in a monopoly, closed situation where there is no competition from another theater.

Each distributor is fully aware of the relative weakness of its economic position in the closed situation.

The technique of playing off one supplier against another with an eye to the securing of an advantage is not uncommon. The closed situation is made to order for the exercise of such a technique. No distributor would relish denial to it of the only available outlet for its product in a given area.

No detriment, therefore, in fact is visited upon the closed situations if the buyer for the buying combine sees

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fit to exercise his exclusive right to deal for closed situations in such a way that the distributor is impressed with the danger of losing its only outlet for exhibition in that area unless it hearkens unto the plain desire of such a potent buyer.

Distributor personnel who must deal with the problem of monopoly buying power at first hand did not contrive fine distinctions without differences. To them there wasn't a particle of difference between a Cooperative or a Mooney, possessed of a financial interest in the theaters for which he was buying and a Cooperative or a Mooney without such a financial interest. (R. I., pp. 63a, 69a, 105a, 184a.)

The price bargaining advantage inuring to the closed situation theater by membership in Cooperative is a very substantial one. Such a theater would not readily give up this advantage even if it were aware that it was being used to further the interests of the Cooperative theater in an open situation. Especially if such a use was by subtle and adroit devices successfully conducted without impact upon it. And Mooney permitted no Cooperative theater to know what product he was buying for another theater, or what he was paying for such product.

If, indeed, absent thread of common ownership, a buyer for a buying combine were not in a position to misuse buying power generated by its monopoly closed situation theaters, what reason could there possibly have been for the definition of a circuit as used in the *Paramount* case, to-wit, "a group of more than five theaters controlled by the same person or a group of more than five theaters which combine through a common agent in licensing films"? (*U. S. v. Paramount, et al.*, 334 U. S. 131, 155.)

What reason would there have been for the final decree in *Paramount* to enjoin exhibitor affiliates of Warners, Fox, and Loew's from buying features for any of their

theaters through "any agent who is known by it to be also acting in such manner for any other exhibitor * * *"? *U. S. v. Paramount*, 70 F. Supp. 53, 75.

What reason would there have been for similarly enjoining Schine, CCH Trade Cases 1948-49, Par. 62,447 p. 63,282, and Griffith respectively, from buying for any theater not owned by such circuits, as provided in the final decrees in each such case?

The answer is plain. A buying combine, even without a thread of common ownership, was recognized in *Paramount* as generating a potential for evil by concentration and centralization of large scale and monopoly buying power.

It is interesting to note, too, that in *Griffith* the trial court considered each of the four exhibitor respondents who bought through a common buying agent to be independent of each other, stating in its opinion:

> "The government contends that the four corporation defendants were combined into one circuit of theatres and refers to it as 'the Circuit.' The evidence does not so disclose. It does disclose that each corporate defendant owned and operated a distinct circuit or chain of theatres." 68 F. Supp. 180, 188.

Notwithstanding this finding, the Supreme Court in reversing the trial court's decision considered the total buying power generated through the common buying agent and held such agent's joinder of open and closed situations in negotiations for product, to be violative of the Act.

The only reported cooperative buying combine case we know of where there was an absence of common ownership of the theaters involved is *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216. (E. D. Mich., 1941.) The court in that case recognized the product difficulties which confronted an independent theater in op-

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position to a theater in a cooperative buying combine. It observed that:

> "When left to his own resources an independent theater owner in competition with a Cooperative member, faces an almost insurmountable handicap." 43 F. Supp. 216, 220.

Nevertheless, at that time it was not prepared to hold the activities of such a combine illegal *per se* where it negotiated for both open and closed situations at the same time.

The *Midwest Theaters* case was decided before the Supreme Court decisions in *Crescent*, *Paramount*, *Schine*, and *Griffith*. It was urged upon the Supreme Court in *Griffith* as authority for the proposition that the use of a common agent was not illegal and that if the arrangement materially aided the Circuit in competition, it was not condemned by law. The plain inference was that the joinder of open and closed situations in the negotiations for product, therefore, was not illegal.

The trial court in *Griffith* had found that none of the distributor-defendants there was intimidated or coerced. That finding of fact was rejected by the Supreme Court because of the joinder of ope nd closed situations in negotiations for product.

Whether Cooperative's negotiations would be proper and legal if it negotiated separately for only its closed situations at one time and then negotiated for its open situations at a separate time is not here in issue. In the case at bar, Cooperative admittedly joined the open Regent situation and its many closed situations in lumped or simultaneous negotiations. In the light of *Crescent*, *Paramount*, *Schine*, and *Griffith*, that was illegal.

The District Court in this case found that petitioner did not suffer any damages as a result of any acts of the

respondents violative of the Anti-Trust Act. Such a finding is a necessary corollary to the Court's view that there was no violation of the Anti-Trust Act by respondents.

It is conceded that petitioner was deprived of product.

What the lower court found further, its opinion recites, is that such deprivation of product, i.e., such damage, was prompted "by considerations other than the monopolistic practices and the conspiracy" charged against the respondents (R. I, p. 160a).

If the lower court had concluded to the contrary, and had held that the deprivation of product was by reason of respondents' course of conduct or business arrangement violative of the Act,—it would follow necessarily that such deprivation had damaged the petitioner because deprivation of product does play a part in preventing the successful operation of a theater.

CONCLUSION.

The decision of the District Court is predicated on an interpretation of the Anti-Trust laws in conflict with the applicable decisions of the United States Supreme Court. Wherefore, your petitioner prays that this petition should be granted.

Respectfully submitted,

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APPENDIX A.

Judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

(Entered March 2, 1953 by Emerich B. Freed, Judge.)

Plaintiff's Amended and Supplemental Complaint is hereby dismissed at Plaintiff's costs, and judgment is hereby rendered for the defendants.

APPENDIX B.

Judgment of the United States Court of Appeals for the Sixth Circuit.

(Filed: November 16, 1954.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C.

Opinions Below.

(See Record Vol. I, pp. 143a and 190a.)

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APPENDIX D.

Opinion of the Court of Appeals for the Sixth Circuit.

(Filed November 16, 1954.)

Before ALLEN, MARTIN and MILLER, Circuit Judges.

PER CURIAM. The District Court dismissed the amended and supplemental complaint of appellant and entered judgment for appellees in this action for treble damages brought by appellant against the appellee motion picture distributors and exhibitors for alleged violation of sections 1, 2 and 7 of the Sherman Anti-trust Act, 15 U. S. C. A., section 1, et seq., and sections 4 and 16 of the Clayton Act, 15 U. S. C. A., sections 1, 2, 15 and 26.

We have thoughtfully considered the arguments advanced, the record in the case, the comprehensive and logically reasoned opinion of District Judge Freed (107 F. Supp. 453), together with his eighty-seven findings of fact, which are supported by substantial evidence and certainly are not clearly erroneous, and his seven conclusions of law, sustained by highest authority. Upon the basis of his opinion, findings and conclusions, we are of opinion that the judgment of the District Court should be affirmed, and that no worthwhile contribution would be made by this court by attempting to re-write in our own words the excellent opinion of the District Judge, who gave most conscientious study to the problems presented and has stated accurate conclusions.

The judgment of the District Court is affirmed.

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HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587.

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., AND LOEW'S INCORPORATED.

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QUESTIONS PRESENTED.

I.

Did the respondents conspire to prefer the Regent theater over the Moreland theater in the distribution and licensing of motion pictures in the area in which those theatres were located?

II.

Was petitioner injured in its business or property as a result of any act or acts of respondents alleged or claimed by petitioner to have been in violation of the anti-trust laws of the United States?

STATEMENT OF CASE.

Petitioner claims that this case involves unlawful misuse of buying power by a motion picture buying "combine" (Pet. p. 4), namely, respondent Cooperative, which is operated by respondent Mooney. No claim is now made that distributor respondents conspired with each other to injure petitioner, and the District Court found as a fact that they did not (Fdgs. 57, 80-82, R. I, 175a, 180a).[1] It is petitioner's argument that Cooperative used the buying power of its customers located in non-competitive situations to coerce each of the distributor respondents separately to discriminate in favor of Cooperative's customer, Gusdanovic's Regent theater, to the detriment of the latter's competitor, petitioner's Moreland theater, in a competitive situation. The District Court found to the contrary (R. I, Fdgs., 77, 78, 85, 86; 179a, 180a), and the Court of Appeals unanimously affirmed those findings. Petitioner makes no attempt to show that those findings are clearly erroneous.

So far as the distributor respondents are involved, many of the facts discussed by petitioner which do not relate to their alleged coercion, such as Mooney's business philosophy, and Gusdanovic's alleged preference of the Regent over the Moreland when he controlled both theaters, are of no concern, and will not be discussed. Petitioner's statement of the facts, however, does not present the situation involved in its true perspective.

The Regent and the Moreland are located on opposite sides of Buckeye Road in Cleveland, about a block apart, the former on the northeast corner of Buckeye Road and East 117th Street and the latter on the opposite side of the

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[1] For convenience, the District Court's findings are designated Fdg.; and the two volumes of the record in this Court are designated I and II, respectively.

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street about a block east of the Regent. They are located in a foreign language neighborhood where a great portion of the residents speak or understand Hungarian (Fdg. 22, R. I, 166a). Both theaters were originally operated on a second run policy, showing pictures 35 days after the first run in downtown Cleveland (Fdg. 19, R. I, 165a). Since the construction of the Colony theater at nearby Shaker Square in 1937 the Regent and Moreland have been third run, showing pictures 7 days after the Colony (Fdg. 18, R. I, 165a).

The Regent, built in 1920, originally had about 960 seats. It was purchased in 1926 by Gusdanovic and a partner for $195,000. It was then enlarged to a capacity of 1500 seats, and completely remodeled and modernized at a cost of $60,000 to $75,000 in 1926 (Fdg. 14, R. I, 164a). Gusdanovic commenced operating the Regent in the summer of 1926 (R. II, 294a).

When Gusdanovic took over the Regent it had available the product of the four distributor respondents, and also that of RKO, Columbia, Paramount and United Artists (Fdg. 19, R. I, 165a).

The Moreland was built in 1927 and opened January 1928. Its first tenant was U-B Theatrical Enterprises, Inc., a company then affiliated with Universal (Fdg. 15, R. I, 164a). When the Moreland opened, Universal began to show its product in the Moreland rather than the Regent.

In 1928 or 1929, the Moreland was taken over by experienced local operators (Fdg. 16, R. I, 164a). It was unsuccessful from the beginning. The theater, although it had as much product as the Regent, consistently lost money on an average of $500 a week (Fdg. 16, R. I, 165a).

Later, in October 1929, the lease and equipment of the Moreland were sold to the respondent Gusdanovic at a substantial loss to the original lessee (Fdg. 17, R. I, 165a).

Gusdanovic operated both the Regent and the Moreland from October 1929 to October 1937.

When the expiration of the lease approached in 1937, the landlord demanded an increase in rent and a provision in any new lease that the Moreland must be kept open seven days a week (Fdg. 22, R. I, 166a). Gusdanovic, who had lost over $80,000 in operating the Moreland from 1929 to 1937 (Fdg. 24, R. I, 167a), refused to meet such terms and the Moreland was then leased to petitioner, effective October 1, 1937 (Fdg. 22, R. I, 166a, 167a).

By 1937 the Moreland had become hopelessly outclassed by the Regent, and "had acquired the reputation of being a theater inferior to the Regent" (Fdg. 67, R. I, 176a).

Petitioner was organized in June 1937 by members of the Greenberger and Polster families (R. II, 148a) and commenced operating the Moreland on October 1, 1937. When petitioner took over operation of the Moreland, it was the practice in the motion picture industry for a producer to sell a full season's product at one time. Therefore, except for Paramount product, three years' accumulation of which was available to the Moreland, product for the 1937-1938 season had already been licensed to the Regent. With the advent of the 1938-1939 season, motion picture distributors had a choice between the Regent and the Moreland in the sale of their product for the prior run exhibition in the area. The distributor respondents, Warners, Fox, Universal and Loew's, continued in general to sell their product on the prior run in the neighborhood to the Regent (Fdg. 38, R. I, 171a).[2] The product of other companies, however, was available to the Moreland; i.e., all product of Paramount and Monogram and one-half of

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[2] Loew's inaugurated competitive bidding between the two theaters in 1946.

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that of RKO, United Artists and Columbia (Fdg. 37, R. I, 170a; R. II, 158a, 159a, 161a). On product licensed to each theater it had a clearance of seven days ahead of the other (Fdg. 64, R. I, 176a).

The Colony Theater was opened in December 1937, in the Shaker Square business district, about a half mile from the Regent and the Moreland, and was granted seven days' clearance over both the Regent and the Moreland. It is a large theater, completely modern in every respect, with extensive parking lot facilities for patrons, which neither the Regent nor the Moreland has (Fdg. 18, R. I, 165a). The opening of the Colony, of course, tended to draw business from both the Regent and the Moreland (Fdg. 77, R. I, 179a) which for years previously had been unable to make money when both were operated by Gusdanovic.

In February 1938, respondent Mooney, who had been employed by Warners as its branch exchange manager in Cleveland and had left its employ in January 1938, organized respondent Cooperative for the purpose of servicing small independent exhibitors in the Cleveland exchange area in the buying and booking of motion picture films for them (Fdg. 27, R. I, 168a). It commenced operations in September 1938 with 22 accounts (Fdg. 28, R. I, 168a; R. II, 305a).

In March 1938, Gusdanovic agreed to become a customer of Cooperative for his four theaters (Fdg. 29, R. I, 169a). When Cooperative commenced operations in September 1938, it bought and booked films for the Regent. This, of course, was almost a year after petitioner had taken over the Moreland.

Cooperative's business with the respondents represented a good portion of the total business done by each in the Cleveland area, but it was by no means the major portion. Thus, Cooperative's business with Warners averaged

only from 9 to 15 per cent of total billing, and with Fox from 7 to 15 per cent (Fdg. 35, R. I, 170a). Cooperative was entirely independent of the small exhibitors who were its customers, as were they of it. Cooperative's customers had no interest, financial or otherwise, in Cooperative, and it had none in them. Any customer could dispense with its services, and Cooperative could cease representing any customer at any time either saw fit (Fdgs. 30-34, R. I, 169a, 170a).

While both theaters located in towns where there was only one theater and theaters located in towns where there was more than one theater were dealt with at the same meetings between Cooperative and a distributor respondent, there was in fact a separate negotiation with respect to each picture for each theater. The District Court found as a fact that neither Mooney nor Cooperative used the one theater town, or non-competitive, situations which they represented to obtain product for the Regent, or any advantage or privilege for it over the Moreland, from any of the distributor respondents (Fdg. 78, R. I, 179a).

The Greenberger and Polster interests, which owned petitioner, operated the Moreland from October 1937 to February 9, 1948. In 1942 they renewed the plaintiff's five year lease on the Moreland at an increased rental. In 1947 they again renewed the lease for a period of ten years (Fdg. 69, R. I, 177a).

The Regent consistently outgrossed the Moreland on product which it exhibited first in the neighborhood during the period from January 1, 1939 to March 18, 1950 (Fdg. 75, R. I, 178a). This was due, in large part, to the difference in physical equipment and upkeep of the two theaters. From at least 1940 on, the Regent was superior to the Moreland in its physical appointments, attractive-

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ness, facilities and comforts for patrons (Fdg. 73, R. I, 178a).

On February 9, 1948, the stock of petitioner was sold by the Greenbergers and Polsters to Stutz, Schneider, Berush and Mendelson. The District Court found that when Stutz and his associates acquired the stock of petitioner and took over the Moreland, it would have cost between $75,000 and $100,000 to bring the physical appointments, equipment and facilities of the Moreland up to the level of those at the Regent at that time (R. I, Fdg. 74, 178a).

The Stutz interests operated the theater for two years from February 1948 to March 1950, when the Moreland was closed. In the meantime petitioner filed this action in October 1949. The situation as to product and the relative attractiveness of the two theaters continued to be the same as under the Greenberger and Polster regime. Stutz was the only member of the new management with any experience in the exhibition end of the motion picture industry, but he continued his full time occupation as manager of the Circle Theater (R. II, 164a, 165a). Under Stutz's management only $246.81 was spent for capital improvements of the Moreland (Fdg. 74, R. I, 178a).

From the time the Moreland was built in 1927 the neighborhood was not large enough to support two theaters of the size of the Regent and the Moreland. After the Colony commenced operations in December, 1937, this situation became even more aggravated (Fdg. 77, R. I, 179a). From 1938 through 1949 the Regent, itself, sustained losses in excess of $40,000 (Fdg. 77, R. I, 179a). It operated at a loss through the period with the exception of the years 1945, 1946 and 1947, which were exceptional years in the history of the motion picture exhibition

industry (R. II, 375a). During the years 1949 and 1950, the motion picture industry, partly because of television, suffered a great slump, and the Moreland, never a profitable theater, was only one of many fringe motion picture theaters throughout the nation and the Cleveland area which were compelled to close their doors (Fdg. 76, R. I, 179a).

Thus, as the District Court found, the failure of the Moreland resulted, not from any conspiracy, but rather from natural competitive causes (Fdgs. 77, 79-87, R. I, 179a-181a).

ARGUMENT.

There is no real question of law in this case. The only questions actually presented were questions of fact which were found against petitioner by the District Court, affirmed by the Court of Appeals. The District Court was clearly right when it said (R. I, 145a, 146a):

> "There is no substantial disagreement between the parties as to the general principles of law applicable here. In fact, both plaintiff and defendants cite the same adjudicated cases in support of their respective contentions. They part company, however, when they seek to apply the well-established principles of law to the facts developed by the testimony. * * * The real controversy in this case is factual, rather than legal in nature, and the existence or nonexistence of an unlawful conspiracy and the extent to which it produced the alleged damages must be resolved on the basis of the facts adduced."

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QUESTION I.

DID THE RESPONDENTS CONSPIRE TO PREFER THE REGENT THEATER OVER THE MORELAND THEATER IN THE DISTRIBUTION AND LICENSING OF MOTION PICTURES IN THE AREA IN WHICH THOSE THEATERS WERE LOCATED?

The District Court summarized the essential elements of petitioner's case, all of which it had to establish by the evidence to entitle it to a judgment in its favor, as follows (R. I, 145a):

> "The defendants take the position that no recovery may be had unless the plaintiff established (1) that Cooperative actually possessed the monopoly buying power which is attributed to it and that it was capable of exercising that power in such a manner as to cause the distributors, independent of other considerations, to prefer the Regent over the Moreland; (2) that such buying power was, in fact, so exercised; (3) that the distributor-defendants did succumb to the dictation of Cooperative and 'knuckle' under the power of Cooperative and further that they did acquiesce in the alleged conspiracy; (4) that as a direct and proximate result of such wrongful conduct by the defendants the plaintiff was injured in its business; and (5) the actual amount of the damages sustained. There can be no question that these are the necessary prerequisites for a finding for the plaintiff. And plaintiff does not dispute it."

This statement of the law is fully supported by the decisions of this Court upon which petitioner relies, *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944); *United States v. Griffith, et al.*, 334 U. S. 100 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); and *United States v. Paramount, et al.*, 334 U. S. 131 (1948).

The District Court, in its Findings of Fact (Fdgs. 78-87, incl., R. I, 179a, 180a), expressly found that the plaintiff had failed to establish by the evidence the existence of any one of the essential elements of its case as above outlined. The Court of Appeals held that these, as well as the rest of the District Court's eighty-seven findings of fact, were supported by substantial evidence (Pet. p. 28, App. D).

Petitioner asserts that the decisions of the courts below conflict with the decisions of this Court in the *Crescent, Griffith, Schine* and *Paramount* cases. There is no such conflict.

Petitioner misapprehends the decisions of the courts below when it asserts that they held that, although Cooperative carried on negotiations with the distributor respondents for all of its exhibitor customers at one time, such conduct *could not* run afoul of the anti-trust laws because Cooperative licenses and books pictures for theaters in which it has no financial interest, and none of which theaters has any financial interest in Cooperative.

The courts below did not so hold but, to the contrary, held that on the facts established by the evidence in this case Cooperative did not have monopoly power and did not exercise monopoly power, and that the distributor respondents were not coerced or improperly influenced in their dealings as between the Moreland and the Regent by anything said or done by Cooperative. The District Court found specifically on this point as follows (R. I, 179a, 180a):

> "78. Neither Mooney nor Cooperative used the closed or non-competitive theater situations which Cooperative represented as a means of obtaining any product for the Regent or any advantage or prefer-

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ence for the Regent over the Moreland from the distributor defendants or any of them.

"79. Each of the distributor defendants in choosing the Regent as its prior run customer rather than the Moreland did so on the merits of the Regent and without regard to the fact that Cooperative was employed to buy and book pictures for the Regent.

"85. Neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power in the negotiation for or licensing of films for the Regent from the distributor defendants.

"86. None of the distributor defendants was intimidated or coerced in their actions in the Regent-Moreland situation by any of the other defendants."

Petitioner asserted in the Court of Appeals that the above essential findings were not supported by the evidence. The Court of Appeals, however, held that those findings are supported by substantial evidence. The enormous differences between the facts of the case at bar and the facts of the *Crescent, Griffith* and *Schine* cases appears clearly from the statements of those cases in the opinions of this Court.

There are no restrictive agreements, such as formula deals, master agreements or blanket deals, involved in the case at bar, as the District Court specifically found (Fdgs. 56, 57, R. I, 174a, 175a). The license contracts between the exhibitors represented by Cooperative and each of the distributor respondents were the standard forms of contract used with all exhibitors, containing the usual and ordinary terms available to all exhibitors generally (Fdg. 56, R. I, 174a). Negotiations between Cooperative and distributor respondents were at all times on a basis of theater by theater and, after each distributor ceased selling on a season basis, picture by picture (Fdg. 43; R. I, 172), and never resulted in a circuit deal or "bushel

basket" deal, but in separate contracts for each theater, including the Regent, with respect to each picture involved (Fdgs. 47, 55; R. I, 173a, 174a).

The two questions which petitioner purports to present do not involve legal questions, but merely relate to questions of fact which have been determined against it by the lower courts.

1. Petitioner's First Question.

This case was tried in the District Court solely on the questions whether respondents had conspired to injure petitioner in its property and business of operating the Moreland theater, and, if so, whether any such conspiracy resulted in damage to petitioner. The District Court answered both questions in the negative and the Court of Appeals affirmed. Petitioner now, however, seeks to inject a legal question with respect to the respondent Cooperative based on the fact that Cooperative did not own the theaters which it represented. Petitioner in its purported first question seeks to imply a holding by the lower courts that was never made, namely, that the lower courts held that (1) Cooperative, because of lack of common ownership of theaters which it represented, could have no monopoly buying power from closed situations of certain of its customers as a matter of law; and that, therefore, (2) while Cooperative often dealt for all of its customers at one time "in a single negotiation" in a way which otherwise would have been illegal, (3) such conduct could not violate the antitrust laws solely because of absence of common ownership. The lower courts did not so hold.

First, as to lack of common ownership, the facts in this particular case disclosed that Cooperative and its customers had no common financial interest which would

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justify Cooperative's refusing to license product advantageously for a customer in a non-competitive situation to force concessions for a customer in a competitive situation (R. I, 95a; Fdg. 30, R. II, 169a). Building up of Cooperative's buying power by such means would not help a customer in a non-competitive situation from the long range standpoint, because Cooperative could stop representing him at any time (R. II, 306a; Fdg. 31, R. I, 169a). The only testimony on the point in the record was that Cooperative would have lost its customers by such conduct (R. II, 311a, 323a, 303a). The District Court said (R. I, 156a):

> "Compelling logic, in this Court's view, directly refutes the plaintiff's contention that Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland. It is to be seriously doubted that an individual theater owner in a noncompetitive situation would suffer his position to be used in a manner, which may work to his detriment, as an instrument for obtaining the preferential treatment of an exhibitor with whom he had no particular connection other than the fact that they were both represented by Cooperative. To the contrary, it is more likely that he should object vigorously to such treatment, even to the point of refusing to purchase the services of Cooperative in the future. The fact was well-known and fully realized by all the parties concerned. In this respect, it is pertinent that no individual exhibitor represented by Cooperative had any financial interest in the operation of the company as a whole."

The District Court found as a fact, not as a matter of law, that Cooperative had no monopoly power (Fdg. 85, R. I, 180a).

Second, as to Cooperative's dealing for its customers in "a single negotiation," the District Court found as a fact that, while Cooperative negotiated for pictures for its

customers in non-competitive situations and for its customers in competitive situations at the same meeting with a particular distributor, the negotiations at the single meeting were conducted separately for each theater, and that Cooperative did not attempt to use its buying power for customers in non-competitive situations as a lever to obtain concessions for its customers in competitive situations. The District Court, in its opinion, stated (R. I, 155a):

> "The plaintiff seeks to establish Cooperative's wrongful use of its purchasing power by showing that Mooney customarily, in bargaining with the distributors, *joined together in a single preliminary contract*[3] theaters represented by Cooperative in 'closed situations' with those located in 'open situations.' Thus, it is claimed that Mooney was able to use the possibility of his refusal to buy in the closed market as a sword above the heads of the distributors to force them to prefer the Regent or any other theater which he represented in an open situation. This course of dealing, plaintiff argues with particular emphasis, is in direct violation of the 'theater by theater' and 'picture by picture' method prescribed by the Supreme Court in United States v. Paramount Pictures, Inc., supra, as the proper and lawful manner of negotiating for films.
>
> "The evidence here does not substantiate the contention that Cooperative used its representation of noncompetitive theaters to exact the preference of the Regent over the Moreland, despite the fact that Mooney often carried on negotiations with the distributor-defendants for all of Cooperative's customer theaters at one time. The mere representation by Cooperative of both competitive and noncompetitive clients, *in a single negotiation*, does not *per se* violate the mandate of 'picture by picture' and 'theater by theater' dealing."

---

[3] Emphasis throughout is supplied.

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The reference to a "single preliminary contract" in the first sentence of the above portion of the District Court's opinion is to the so-called "deal sheet" which was used for convenience by Cooperative in negotiating separately with each distributor. This appears later in the Court's opinion, in which it is stated (R. I, 157a):

> "Time and time again throughout its argument the plaintiff directed the Court's attention to *the preliminary contracts* which it had offered as exhibits. These contracts, *or 'deal sheets,'* as they are called in the movie industry, are commonly used by booking agents in negotiating with the distributors for films for the various theaters which they represent. The plaintiff complains of the fact Mooney, in his negotiations with the distributor-defendants, customarily 'lumped together' all or a large number of his exhibitor clients in a single deal sheet. *Here again the evidence is ineffective to prove a conspiracy.*"

The District Court's conclusion, above emphasized, as to the so-called "deal sheet" negotiations is fully supported by its Findings of Fact Numbers 46, 47 and 48 (R. I, 172a, 173a).

Thus, the lower courts did not base their decisions on the grounds relied upon by petitioner as the premise of its first question. The fact that the theaters represented by Cooperative did not have common ownership played no part in the District Court's holding that Cooperative had no monopoly and had not attempted to monopolize, and that the distributor respondents were not influenced by Cooperative's representation of other theaters in their dealings with Cooperative for the Regent theater.

The entire first question which petitioner purports to present is based, moreover, on the assumption that "the crucial finding of fact by the Trial Court from which the judgment entered necessarily followed" (Pet. p. 14) was

Finding Number 85, that neither "Mooney nor Cooperative had or exercised or attempted to exercise monopoly power" in negotiations with the distributor respondents. This overlooks the fact that, even if the lower courts had found that Cooperative had monopoly power and attempted to exercise it in negotiations with distributor respondents, it was necessary that they further find that distributor respondents succumbed to the coercion of Cooperative in order to impose liability on them. The District Court found as a fact that the distributor respondents were not coerced (R. I, 180a):

> "86. None of the distributor defendants was intimidated or coerced in their actions in the Regent Moreland situation by any of the other defendants."

Petitioner does not undertake to demonstrate in this Court that this finding is clearly erroneous.

2. Petitioner's Second Question.

Petitioner's statement of the second question which it attempts to present is ambiguous. There is no separate discussion of it in petitioner's argument.

If petitioner means to suggest that Cooperative negotiated, in one negotiation, circuit license agreements covering both its competitive and non-competitive situation customers collectively, the discussion above demonstrates that the District Court found that the facts were otherwise. The Court of Appeals held that these findings were supported by substantial evidence.

If, on the other hand, petitioner contends that an exhibitor, or an agent representing exhibitors, such as Cooperative, cannot as a matter of law bargain at one conference separately for product for its competitive and non-competitive situations, theater by theater, there is no merit in such contention.

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This Court has never indicated any impropriety in such a course of conduct. On the contrary, this Court recognized in *Griffith,* that the mere existence of large scale buying power, is not unlawful, saying (334 U. S., at p. 108):

> "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce."

It is only in those cases where non-competitive situation monopoly buying power has been used to obtain unlawful advantages covering both competitive and non-competitive situations that the result has been condemned. No such situation existed here. The District Court dealt realistically with petitioner's contention in this respect, saying (R. I, 157a):

> "* * * The frivolity of requiring Mooney to negotiate by means of a separate deal sheet and in a separate sitting for each of his clients is too obvious to require an extended explanation."

QUESTION II.

WAS PETITIONER INJURED IN ITS BUSINESS OR PROPERTY AS A RESULT OF ANY ACT OR ACTS OF RESPONDENTS ALLEGED OR CLAIMED BY PETITIONER TO HAVE BEEN IN VIOLATION OF THE ANTITRUST LAWS OF THE UNITED STATES?

The lower courts found that petitioner had failed to establish that any loss it suffered was attributable to conduct of the respondents.

Petitioner makes the wholly unsound contention that the District Court found that petitioner did not suffer any damages as a result of any acts of the respondents violative of the Anti-Trust Act merely as a necessary corollary

to its conclusion that there were no anti-trust law violations (Pet. p. 26). The District Court went further and found as a fact, and held as a matter of law, that "Plaintiff was not injured in its business or property and did not suffer any damage as a result of any act or acts of the defendants alleged or claimed by the plaintiff to have been in violation of the Anti-Trust Laws of the United States." (Fdg. 87, R. I, 180a; Conclusion of Law 3, R. I, 181a.)

Petitioner relies on certain language in the opinion of the District Court as supporting its contention that the Court did not intend to pass upon that question (Pet. p. 26). This statement, of which petitioner quotes only a portion, is, in its entirety, as follows (R. I, 160a):

> "Under no circumstances should this Court be taken as having decided that the deprivation of product plays no part in defeating the successful operation of a theater. *It has held merely that the deprivation of product in this case was prompted by considerations other than the monopolistic practices and conspiracy with which these defendants were charged.*"

Certainly, the clear purport of this language is directly contrary to any suggestion that the lower courts did not pass upon the question of injury or damage.

Petitioner is not entitled to judgment unless it has established by the evidence that there was a conspiracy and that, as a direct result thereof, it was in fact injured in its business or property. Finding 87 and Conclusion of Law 3 of the District Court are conclusive against petitioner on this point. The evidence amply supports that finding and that conclusion. Petitioner has not attempted to and cannot show that they are clearly erroneous.

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CONCLUSION.

Petitioner has advanced no valid reason why a writ of certiorari should issue to the Court of Appeals for the Sixth Circuit.

In affirming the judgment below by unanimous decision, the Court of Appeals said:

> "We have thoughtfully considered the arguments advanced, the record in the case, the comprehensive and logically reasoned opinion of District Judge Freed (107 F. Supp. 453), together with his eighty-seven findings of fact, which are supported by substantial evidence and certainly are not clearly erroneous, and his seven conclusions of law, sustained by highest authority. Upon the basis of his opinion, findings and conclusions, we are of opinion that the judgment of the District Court should be affirmed, and that no worthwhile contribution would be made by this court by attempting to re-write in our own words the excellent opinion of the District Judge, who gave most conscientious study to the problems presented and has stated accurate conclusions."

Petitioner has not attempted to, and cannot, show that any of the findings of the District Court are clearly erroneous, *United States v. Oregon Med. Soc.*, 343 U. S. 326; *United States v. Gypsum Co.*, 333 U. S. 364; *United States v. Yellow Cab Co.*, 338 U. S. 338.

There is nothing in the decision of the District Court or of the Court of Appeals for the Sixth Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised

by the petitioner which has not been, but which should be, settled by this Court.

Respectfully submitted,

LUTHER DAY,

Attorney for Distributor Respondents, Warner Bros. Distributing Corporation, Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., and Loew's Incorporated.

THOMAS M. HARMAN,
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Of Counsel.

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FILED
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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587.

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATRE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION OF RESPONDENTS, REGENT THEATRE COMPANY, CRANWOOD THEATRE COMPANY, CINEMA SERVICE CORP., EAST SHORE THEATRE COMPANY, PAUL GUSDANOVIC, COOPERATIVE THEATRES OF OHIO, INC., AND MILTON A. MOONEY.

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OPINIONS BELOW.

The opinion of the District Court is reported at 107 F. Supp. 453 and appears in Volume I of the record, page 143a. The opinion of the Court of Appeals for the Sixth Circuit is reported at 216 F. 2d 749 and appears in Appendix "D" of the petition and also in Volume I of the record, page 190a.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

I.

Did the respondents conspire to prefer the Regent Theatre over the Moreland Theatre in the distribution and licensing of motion pictures in the area in which those two theatres were located?

II.

Was the petitioner injured in its business or property as a result of any act or acts of the respondents alleged or claimed by the petitioner to have been in violation of the Anti-Trust Laws of the United States?

STATUTES INVOLVED.

The pertinent provisions of the Anti-Trust Act, 15 U. S. C., Sections 1, 2, 7 and 15, are set forth in the petition at pp. 2-4.

STATEMENT OF THE CASE.

Inasmuch as the decision in this case turned only on questions of fact and as a wholly inadequate and one-sided statement of the facts is made by petitioner, it is necessary for respondents to give the Court a more accurate and comprehensive statement of the facts.

This is an action for treble damages under the Anti-Trust Laws. Although brought technically by The G. & P. Amusement Company, a corporation, it is actually for the benefit of its present shareholders, Emanuel J. Stutz and his associates, who acquired all of its stock for $6,000.00 in February, 1948, about a year and a half before this suit was instituted (R. II, p. 169a). They also gave a note for $12,750.00 to reimburse the old shareholders for a $12,750.00 cash deposit owned by the petitioner and

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which was on deposit with the lessor of the Moreland Theatre (R. II, p. 463a). Within a period of a few weeks, the new shareholders, the real parties in interest here, had repaid themselves the entire $6,000.00 out of moneys advanced by the confectionery concessionaire at the Moreland Theatre (R. II, p. 172a).

Respondent, Paul Gusdanovic, has operated the Regent Theatre continuously since 1926 and has invested in it a sum in excess of $330,000.00. Stutz and his associates operating the Moreland for about two years without actual investment seek from the respondents the sum of $553,529.00 as claimed treble damages. This attempt to transform an investment of zero into a return of over one-half million dollars arises out of the fact that the Moreland and the Regent Theatres are located in the same neighborhood, a short distance from each other, and the petitioner claims that a portion of the motion picture feature films of the distributor-respondents which had been exhibited at the Regent should have been licensed for exhibition at the Moreland on a run ahead of the Regent.

The Moreland was erected about eight years after the Regent and was operated at the beginning by a group which included a large national circuit, Universal Pictures, Inc. The Moreland in its first year or two operated at a loss of about $500.00 a week although at that time it had as much first-run feature product as the Regent (R. II, p. 368a). Its operators then persuaded Gusdanovic to buy the lease from them (R. II, pp. 370a-371a). Gusdanovic at first showed good product at the Moreland but the grosses were so poor that they did not even pay for the film rental (R. II, p. 144a).

To cut down his losses, Gusdanovic for a time closed the theatre altogether (R. II, p. 299a) and finally after

surrendering a $20,000.00 cash deposit and the equipment and furnishings to his lessor, he secured a reduction in rent and opened the Moreland two days a week, nine months of the year. Both theatres are located in a Hungarian language neighborhood and Gusdanovic, to draw patronage to the Moreland, showed Hungarian language pictures there. This policy was continued by the petitioner throughout the period of about thirteen years during which it operated the Moreland until the theatre closed. The showing of Hungarian language pictures for a period of some twenty odd years typed the Moreland as a foreign language theatre.

Gusdanovic suffered large losses from the combined operation of the Moreland and Regent as the neighborhood could not support two theatres even with the savings from combined operation. Gusdanovic gave up the Moreland at the end of September, 1937, upon the expiration of his lease.

For the second time, the operation of the Moreland ended in failure and loss, both times before the respondent, Cooperative Theatres of Ohio, Inc., was in existence. In July, 1937, petitioner was incorporated to take over the operation of the Moreland upon the expiration of Gusdanovic's lease at the end of September, 1937. Its organizers were connected with an important local circuit of theatres known as Community Circuit.

The history of the two theatres showed that the Regent in its appointments and facilities kept pace with the times whereas the Moreland retrogressed. In the period subsequent to October, 1937, Gusdanovic continued to expend large sums of money in modernizing and keeping the Regent as a first-class neighborhood theatre. In 1940, he completely remodeled, refurnished and modernized the Regent (R. II, pp. 301a-302a, 336a-337a, 340a-341a). Ad-

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ditional major improvements were made in the years following 1940 (R. II, pp. 302a-303a). In 1946, a complete air-conditioning and refrigeration system of the most modern type was installed in the Regent (R. II, p. 417a). During the period since 1940, a sum in excess of $55,000.00 was spent in making these improvements to the Regent.

In contrast, petitioner, when it took over the Moreland in 1937, installed a sound system and did some painting at a total cost of $6,300.00 and thereafter from 1938 until the theatre closed in 1950 expended less than $1,700.00 for modernization and improvements. The Moreland at no time had an air-conditioning or refrigerating system and throughout the entire period continued to have substantially only the original equipment put in when it was constructed at the end of 1927. When Stutz and his associates acquired all of the shares of petitioner in 1948, it would have taken between $75,000.00 and $100,000.00 to bring the Moreland up to the physical condition in which the Regent was at that time (R. II, pp. 344a, 356a). Notwithstanding the marked physical inferiority of the Moreland, the petitioner expended a total sum of $246.81 during the entire period from February, 1948, to March, 1950, for improvements to the Moreland.

At least since 1940, the Moreland has not been competitive with the Regent from the point of view of physical equipment, appointments, comfort and attractiveness to theatre-goers. In the opinion of expert motion picture exhibitors who testified at the trial, the Moreland's lack of competitiveness with the Regent in these respects was so serious that the Moreland could not be operated successfully (R. II, pp. 345a, 356a, 361a-364a) even if all the product of the distributors were equally divided between the two theatres (R. II, pp. 376a-378a).

The already difficult situation of the Regent and the Moreland in the neighborhood was worsened when shortly after petitioner took over the Moreland in 1937, a large, modern, well-located theatre with extensive parking lot facilities for its patrons, which latter were wholly lacking by both the Moreland and the Regent, opened about one-half mile from the Regent and the Moreland.

Even with the extensive improvements made to the Regent, it operated at a loss each year since 1940 with the exception of the years 1945, 1946 and 1947 which were outstanding years in the history of the motion picture industry.

The Court found that the neighborhood in which the Regent and the Moreland were located was not large enough to support two theatres of that size in close proximity to each other, a condition which prevailed in all neighborhoods in the Cleveland area practically without exception. This was testified to by two outstanding disinterested motion picture exhibitors in the Cleveland area, Fine and Essick, as well as by Mooney (R. I, p. 21a; R. II, pp. 97a, 358a-359a, 368a-369a, 371a-374a, 379a).

In 1938, Gusdanovic became too ill to perform any longer the arduous work of buying and booking film and to spend the large amount of time and effort required at film exchanges. By employing respondent, Cooperative Theatres of Ohio, Inc., to perform this service, he was thus enabled to continue his business within the limitations of his health (R. I, p. 101a).

Respondent, Cooperative Theatres of Ohio, Inc., is not a cooperative enterprise as the name might imply, nor is it a "combine" as petitioner seeks to mislabel it. It is merely a service agency owned entirely by respondent, Milton A. Mooney, and members of his family. For a small fixed fee, it performs the service of renting and booking

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films for independent theatre exhibitors who employ it. None of the exhibitors for whom Cooperative Theatres of Ohio, Inc., hereinafter called "Cooperative," performed these services ever owned any shares of Cooperative or were ever officers or directors of Cooperative. None of the exhibitors had any interest of any kind in any earnings of Cooperative nor did Cooperative have any interest in any of the earnings of the exhibitors who employed it. None of the exhibitors who employed Cooperative had any interest in any of the earnings or operations of any other exhibitor who employed Cooperative. Every exhibitor was completely independent of Cooperative and of all other exhibitors who employed Cooperative (R. II, pp. 93a-94a, 95a). No exhibitor would permit Cooperative to forego an advantage for his theatre or to put him at a disadvantage in order to further the cause of some other theatre for which Cooperative was buying (R. II, pp. 303a, 311a, 323a). The assertion made by the petitioner in the petition (page 23) that an independent exhibitor who employed Cooperative would so permit his theatre to be used is pure conjecture on the part of the petitioner and is not only without foundation in the record but is directly contrary to all the evidence in the record on that matter.

Except in a few instances in the first year or two of its existence, there was no written contract between Cooperative and any of the exhibitors who employed it. The exhibitors could and did terminate their employment of Cooperative at will and without the imposition of any penalty of any kind (R. II, pp. 306a-307a). The impression which petitioner seeks to give that the exhibitor lost all control over the right to contract for his film by quoting from a contract which was used only in a few instances in the first year or two is entirely misleading. On occasions when a distributor was unable to reach what it considered satis-

factory terms with Cooperative, it would go directly to the exhibitors whom Cooperative represented and deal with them (R. II, pp. 50a-51a). Each exhibitor had the right to and in many instances did direct Cooperative as to what films it should and should not buy for that exhibitor's theatre (R. I, p. 13a).

Cooperative made it possible for each exhibitor who employed it to exhibit films in his theatre chosen on the basis of expert knowledge and adequate time devoted to negotiation with distributors. The buying of film by exhibitors is long drawn out, sharply contested and time consuming. Very often tempers flare and strong language is used. This occurs in the course of negotiations with most exhibitors (R. II, pp. 72a, 76a, 131a). Prudent buying of film depends upon thorough knowledge of the probable value of a picture in a particular theatre based upon screening of the features offered and checking on their box office history in comparable situations, services which were rendered by Cooperative (R. II, pp. 308a, 324a-325a). Cooperative also arranged for advertising, trailers, posters and delivery of the films (R. II, p. 307a). It was able to and did properly match and balance two features into an attractive double feature program (R. II, p. 325a).

For all of these services, Cooperative charged each theatre a small weekly flat fee ranging at first from $7.50 to $20.00 and latterly from $17.50 to $25.00 (R. II, pp. 94a-95a). The number of theatres employing the services of Cooperative varied from time to time. When the motion picture business began to decline rapidly in 1949 and 1950, Cooperative lost many of its accounts. Conventional theatres employing Cooperative fell from a peak of 105 to 71 at the time of the trial of this action (R. II, p. 310a).

The petitioner itself employed Cooperative for a time in 1948 to buy and book film for it in the same manner as

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Cooperative did for the other exhibitors who employed it. After several months, petitioner terminated the services of Cooperative but immediately employed another buying and booking agency performing the same kind of services as Cooperative and continued to employ such buying and booking agency until the Moreland closed in March, 1950 (R. II, pp. 175a-176a).

The negotiations between Cooperative and the distributors for pictures were on a theatre-by-theatre and picture-by-picture basis. At the outset of the meetings between the parties, the price to be paid for the particular picture by the first theatre on the list would be discussed. Into this discussion would enter a number of factors including the size, location and type of theatre, the type of picture involved, its prior box office history, its grossing possibilities at the individual theatre and the availability date. The testimony and exhibits show a process of bargaining back and forth which resulted in working out rentals for some theatres for some pictures and not for others. When an agreement had been reached for a particular picture for the first theatre on the list, the parties would then take up the second theatre and the process would be repeated until they had covered each theatre which desired to exhibit the picture and had completed the negotiations for each one. Some of the theatres on the list would not buy the picture or pictures under negotiation for a variety of reasons. In some instances, the picture was not deemed suitable by Cooperative for a particular theatre and in still other instances, the price for a particular picture at a particular theatre could not be agreed upon between the parties (R. I, pp. 11a-12a, 80a, 101a-102a; R. II, pp. 67a-70a, 111a-113a, 127a-128a, 384a-385a, 400a-401a, 413a-415a, 446a). The evidence in the record supports the findings of fact made by the District

Court in its findings Nos. 43-48, inclusive, relating to these matters (R. I, pp. 172a-173a).

Both the Regent and the Moreland during most of the period involved here had a policy of three changes of program a week. Almost continuously during this period, on one of these changes, for two days each week, the Moreland played Hungarian language pictures. On the other two changes, it played English language pictures. The Regent played English language pictures on all three changes that it made each week. On their English language changes, both theatres, throughout practically all of the period charged, played double features.

Each theatre played product first-run in the neighborhood of some of the eight major distributors. The Moreland played first-run in the neighborhood and ahead of the Regent all of the product of Paramount, one-half of the product of RKO, one-half of Columbia, one-half of United Artists, all of Disney Productions, all of Goldwyn Productions, the product of the latter two being released through major distributors, and from the latter part of 1946 most of the product of Loew's (R. I, pp. 94a-95a; R. II, pp. 158a-159a, 322a-323a). Each theatre on the product which it played first-run in the neighborhood had a clearance of only seven days over the other theatre.

Both the Moreland and the Regent, in addition to exhibiting the films of major distributors, also exhibited the films of various of the so-called independent distributors.

The Hungarian language pictures at the Moreland consistently outgrossed the first-run product of the major distributors shown at the Moreland (R. II, pp. 441a-443a, 456a-457a).

Each of the distributor-respondents had many situations in which it sold its product to opposition houses of

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exhibitors employing Cooperative (R. II, pp. 80a-93a). A number of them from time to time sold away from the Regent to the Moreland. Fox did on occasions when the Regent refused to meet its price demands (R. II, pp. 215a-217a); Universal did when it decided to find out the potential grossing power of the Moreland (R. I, pp. 114a-116a; R. II, pp. 246a-247a); Warner did when it sold pictures to the Moreland when the Regent did not meet its terms (R. II, pp. 221a-223a, 234a-235a). Loew's, in 1946, made the Regent the object of its first experiment in competitive bidding in the entire Cleveland exchange area, and of the many situations where it might have tested out competitive bidding, chose the Regent-Moreland situation although the Regent had been its customer for upwards of twenty years at the time and although Cooperative was the buying agent for the Regent (R. II, pp. 130a-131a, 275a-277a). Petitioner blandly asserts that when Loew's did this, Cooperative stopped buying Loew's product for all of the theatres it was representing. The evidence shows the contrary. Cooperative stopped buying only for Gusdanovic on his express directions but continued to buy Loew's for the other exhibitors it represented as shown by the summary of the cut-off sheets introduced in evidence. The other theatres would not have countenanced giving up Loew's because of a dispute between the Regent and Loew's (R. II, pp. 312a-313a).

During the years 1949 and 1950, the motion picture industry experienced the greatest slump in its history. Many theatres throughout the nation and throughout the Cleveland area were compelled by lack of business to close their doors including many of the theatres employing Cooperative (R. I, p. 179a, Finding 76; R. II, pp. 147a, 309a-310a, 375a).

ARGUMENT.

The petitioner in its argument seeks to give the impression that the courts below have held that a common buying agent because it does not own the theatres which it represents is not subject to the Anti-Trust Acts. Nothing could be further from the fact. What the courts below held was that the evidence in this case did not show that the respondents had in any way violated the Anti-Trust Acts. The District Court, whose opinion was adopted by the Court of Appeals, stated:

> "There is no dispute that, if the evidence even though purely circumstantial should disclose the existence of a monopoly power and the wrongful use of that power, this Court would be duty-bound to award such damages as are proved." (R. I, p. 152a.)

Again at R. I, p. 158a, the District Court held:

> "This Court is firmly convinced that there is complete and utter failure of proof, that the alleged monopoly buying power and conspiracy ever existed."

The fact that there was no common ownership of the theatres which employed Cooperative in this case was only one matter of evidence which the Court considered. Upon a consideration of all of the evidence before it, the District Court found that there had been no conspiracy and no monopoly.

If there is anything in the record which is clearly beyond question and substantiated over and over by the testimony and exhibits, it is that the negotiations between Cooperative and each of the distributor-respondents were separate as to each theatre and as to each picture, that is, theatre-by-theatre and picture-by-picture. As against this evidence, petitioner relies merely upon innuendo of blanket dealing from the fact that Cooperative represented a number of theatres and carried on negotiations for some of them

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at the same meetings, and that in some cases the contracts for each individual theatre and each individual picture were placed for convenience in one instrument. As was held by the District Court:

> "The frivolity of requiring Mooney to negotiate by means of a separate deal sheet and in a separate sitting for each of his clients is too obvious to require an extended explanation." (R. I, p. 157a.)

This whole course of theatre-by-theatre and picture-by-picture dealing is overwhelmingly supported by the record (R. I, pp. 12a, 80a, 101a-102a; R. II, pp. 67a-70a, 111a-113a, 128a, 384a-385a, 400a-401a, 413a, 414a-415a, 446a).

On the basis of the evidence, the Court found in Finding No. 43:

> "The negotiations between Cooperative and Mooney on behalf of the exhibitors Cooperative represented and each of the distributor defendants were on a basis of theatre-by-theatre, and after each distributor ceased selling on a season basis, picture-by-picture. This was so whether or not individual contracts for each theatre were embodied in one document or in separate documents." (R. I, p. 172a.)

It is immaterial whether the evidence of the bargaining was set forth on one piece of paper or on ten pieces of paper. The individual character of the negotiations not the form in which they were recorded is the test of their lawfulness.

Petitioner on page 11 of the petition in referring to the testimony of Zucker does not give the testimony of the witness as to why Universal sold to the Regent. Zucker testified:

> "A. I sold to the Regent Theater because the Regent Theater had been a customer of Universal Pic-

tures for some considerable period of time prior to my employment by Universal Pictures.

Q. Was that also the reason why you never considered selling to the Moreland? A. That would be one of the reasons. I had no knowledge of my own that Moreland Theater desired to buy Universal pictures." (R. II, p. 99a.)

At page 8 of the petition, petitioner quotes an alleged statement that Mooney told Schmertz, the Fox branch manager, that he did not dare sell any of the opposition houses. Mooney emphatically denied making this statement to Schmertz or anyone else (R. II, pp. 311a-312a). It is in evidence that a branch manager sometimes made reports, quite humanly and understandably, as to statements supposedly made by an exhibitor in order to relieve the heavy pressure of the home office on himself (R. II, pp. 231a-232a, 405a). The point of the matter is that the trial court, upon the evidence before it, believed Mooney's testimony that he had not made such a statement. The Court found:

"None of the distributor defendants was intimidated or coerced in their actions in the Regent-Moreland situation by any of the other defendants." (R. I, p. 180a, Finding 86.)

Cooperative was not a "combine" as it is sought to be labeled by petitioner in its brief. Cooperative being merely an employee of many individual exhibitors could not use the theatres of some exhibitors as a lever to obtain advantages for other exhibitors. Each of the exhibitors employing Cooperative was interested only in his own theatre and in obtaining the best deal that he could for his own theatre. He was completely uninterested in and had no stake whatever in what kind of a deal was made for some other theatre which also was employing Coopera-

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tive to do its buying. No exhibitor employing Cooperative would have permitted Cooperative to use his theatre and put his theatre at a disadvantage even temporarily in order to obtain some advantage for another theatre in which that exhibitor had no interest (R. II, p. 303a). Cooperative had no power whatever to compel any exhibitor who employed it to forego the showing of any picture in order to help another exhibitor. Any exhibitor could dispense with the services of Cooperative at any time he chose. Mooney clearly stated that if he had tried to disadvantage one of his exhibitor accounts to gain an advantage for another one of his exhibitor accounts, he would soon have been out of business (R. II, pp. 311a, 323a).

In the *Paramount, Schine* and *Griffith* cases, the reason for enjoining the defendants there from either using a buying agency or from buying for theatres which were not owned by them was because the defendants in those cases had been found to have engaged generally in a conspiracy in violation of the Anti-Trust Acts and this was a means adopted, among others, to prevent a recurrence of the illegal actions of the defendants in those specific cases. They do not hold, however, that a buying agent who represents a number of independent exhibitors is *ipso facto* in violation of the Anti-Trust Laws.

There is nothing unlawful in an exhibitor seeking to retain the product which he has. The law merely forbids the use of unlawful means to accomplish this lawful purpose. *Windsor Theatre Company vs. Walbrook,* 189 F. 2d 797. There is no proof whatever in the record that Cooperative ever engaged in any unlawful activity in order to attempt to retain for the Regent the product which it had when Cooperative took over the buying for the Regent. In fact, a large part of this product was lost to the Regent after Cooperative became its buying agent (R. II, pp. 10a,

105a-106a, 130a-131a, 275a-277a). The District Court's findings were:

> "78. Neither Mooney nor Cooperative used the closed or noncompetitive situations which Cooperative represented as a means of obtaining any product for the Regent or any advantage or privilege for the Regent over the Moreland from the distributor defendants or any of them."
>
> "79. Each of the distributor defendants in choosing the Regent as its prior run customer rather than the Moreland did so on the merits of the Regent and without regard to the fact that Cooperative was employed to buy and book pictures for the Regent." (R. I, pp. 179a-180a.)

In decided contrast with the method of negotiation for product carried on by Cooperative, are the so-called master agreements or bushel basket deals which were the vice in the cases decided by this Court and which petitioner cites. There is a vast amount of difference between the master agreements contained in *United States v. Paramount,* 334 U. S. 131, 85 F. Supp. 881, and the type of negotiation carried on by Cooperative with each of the distributors. In *Paramount,* the Court found that master agreements had been entered into between the defendants which allowed a circuit to allocate the film rental paid among its theatres as it saw fit and also to exhibit the features upon such playing time as it deemed best and left other terms to the circuit's discretion. It is this type of agreement which was found to be in restraint of trade. At no time did Cooperative have any right to allocate the film rentals among the various theatres for which it bought product and at no time did it have the right to exhibit the features on playing time as it deemed best. In every case, the actual film rental or the percentage rental figure of each film for each theatre was determined in advance by contract and

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the individual availability date for each theatre appeared upon each theatre's contract. Cooperative was in no position to manipulate the film rentals or the playing dates as between different exhibitors whom it represented.

The attempt of the petitioner to equate Cooperative with the circuits in Paramount and similar Government-instituted injunction actions by constantly referring to it as a "circuit" is without factual basis. Cooperative is not a circuit in the sense of theatres which are united in ownership and interest and responsive to a single will. Such unity of ownership can sacrifice the interest of some theatres for the benefit of others, something which Cooperative could not do; but even if Cooperative could be designated as a circuit, there is nothing in any of the cases which holds that a circuit is unlawful *per se*. In fact, in *Paramount*, 334 U. S. 131, circuits were provided for under the decree of the Court, some of them embracing large numbers of theatres. Likewise in *Schine*, *Griffith* and *Crescent*, circuits were recognized as lawful instrumentalities, although certain vices in the operation of those particular circuits, especially where there were affiliated ownerships between exhibitors and distributors, were eliminated. Nevertheless, in all of these cases, circuits as such were not forbidden and their right to continued existence was recognized.

Buying power is not unlawful *per se*. As was held by this Court in *Griffith*, 334 U. S. 100, 108:

> "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer."

It becomes unlawful only when it is exercised in unreasonable restraint of trade.

The decision of the Courts below in the case at bar is not in conflict with the decisions of this Court cited in the

petition. In *Paramount*, 334 U. S. 131, this Court dealt with price fixing, unreasonable clearances, illegal pooling agreements and joint ownerships, none of which are involved in this case. The Court also dealt with certain types of formula deals, master agreements and franchises which are not in issue here. In formula deals, the license fee for a picture was measured by a certain percentage of the national gross and the circuit was also allowed to allocate playing time and film rentals among the various theatres as it saw fit with no fixed price for each theatre of the circuit, a tremendous competitive advantage. There are no formula deals in this case.

We have already discussed master agreements which likewise embodied the features of one aggregate price for all of the theatres of a circuit, and permitted the circuit to allocate the film rentals among its theatres as it saw fit and to shuffle playing times in the circuit's discretion, all to the great advantage of the circuit. There are no such agreements in this case.

Franchises likewise are not involved in this case. This Court also struck down block booking. This practice went out long ago and is not in issue in this case. This Court also condemned various contract discriminations contained in the contracts with the big circuits. These discriminations were the result of the inclusion of provisions in contracts with the major circuits which were not included in the standard contracts of the distributors. The only contracts made in the case at bar by the distributors in licensing films to theatres serviced by Cooperative were the standard contracts used by the distributor with all individual independent exhibitors, with no different or discriminatory clauses.

While the District Court in *Paramount* had provided in its decree for competitive bidding, this Court eliminated that feature.

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In *Crescent*, 323 U. S. 173, the Court was dealing with a circuit of commonly-owned and controlled theatres with a single-minded purpose bent upon creating a circuit empire. The defendants in *Crescent* would force a competitor to sell out to them by intimidating the distributor so as not to renew his contracts for films, and the competitor frequently then came to terms and signed an agreement not to compete. In addition, agreements not to compete extended far beyond the protection of the business sold and demonstrated a clear intention to monopolize theatre operation wherever those defendants gained a foothold. There were franchise agreements of such a nature that a second run after defendants' theatres was virtually eliminated. We have no such factual situation in this case nor anything which remotely resembles it.

In *Griffith*, 334 U. S. 100, there was likewise a suit against a powerful circuit of commonly-owned and controlled companies. They were not independent of each other as the petitioner seeks to imply (petition, page 24). This Court held, 334 U. S. 100, 101:

> "The appellees are four affiliated corporations and two individuals who are associated with them as stockholders and officers."

Here, again, master agreements similar to those in *Paramount* were executed, with the right of the circuit at its whim and for its own purposes to allocate film rentals, playing times and other terms among its various theatres, so that it could manipulate the use of the product against competitors at will. This Court held that large-scale buying power is not unlawful per se and that it might yield price or other lawful advantages to the buyer, but that the use of the kind of blanket agreements there involved was unlawful. Since we have no such agreements here, the language used by the Court in striking down the practices in that case is wholly inapplicable to the case at bar.

In *Schine*, 334 U. S. 110, the defendant-exhibitor comprised a powerful aggregation of theatres chiefly owned and completely controlled by the Schine interests. The District Court made specific findings as to the predatory means used by Schine in stifling competition. Schine insisted that distributors refrain from selling certain independent competitors any pictures on any run whatever and the distributors agreed to this; Schine obtained unreasonable clearances year after year in many towns, in some instances of as much as 120 days where no clearance had existed before; Schine forced competitors to give up their leases by threatening to build in opposition and taking other action designed to intimidate them; Schine consistently erected new theatres wherever an independent started construction in order to drive him out of business; Schine forced independents to sell out to it under threats to build unless they did so; Schine threatened to build an opposition theatre and to undercut it with a ruinous admission price policy if the independent went ahead with the plans to build; Schine made franchise agreements for periods of two or three years at special film rentals not given independents and in at least one case, the agreement was made to cover subsequently acquired theatres.

There is not one shred of evidence in the record that Cooperative or any of the respondents in this case did any of the things which this Court struck down in the cases we have just referred to. Petitioner is wholly unwarranted in its attempt to use certain phrases culled from the opinions of those cases as applicable here where the factual situation is entirely different.

In cases recently decided, various United States Courts of Appeals and United States District Courts have refused to adopt the sort of generalization which petitioner

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seeks to use here and have refused to render judgment against defendants where plaintiffs have merely used phrases by rote, unsubstantiated by proof of unlawful restraints. This has been supported by this Court by its decision in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation,* 346 U. S. 537. This Court also denied certiorari in *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.,* 342 U. S. 926 and *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.* (January 10, 1955), ___ U. S. ___, 99 L. ed. Advance p. 207.

A recent case in point is *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.,* 86 F. Supp. 716, affirmed by the Court of Appeals in 190 F. 2d 951, certiorari denied, 342 U. S. 926. That case was a much stronger case for the plaintiff there than the case at bar, because the defendant-exhibitors were the so-called Shea group, a circuit controlled and largely owned by Paramount and Loew's. In that case, as in this case, the defendants had operated a theatre, which the plaintiff later acquired after defendants had lost money in it and had surrendered the lease. In that case, the plaintiff complained of an alleged buying power used to restrain competition and of various alleged discriminatory practices. Judge Knight, who had decided the *Schine* case against the defendants therein, had no difficulty in finding for the defendants in the *Dipson* case. The Court weighed the facts of that case and found no analogy to the *Paramount, Schine* and similar cases. The Court found that each of the distributor-defendants had exercised its right to select its own customer. It is further significant that this case was affirmed by the Court of Appeals for the Second Circuit in an opinion written by Judge Augustus N. Hand, who was the same judge who had written the opinion for the three-judge statutory court in the *Paramount* case in which judgment had been rendered against

some of the same distributor-defendants. This Court denied certiorari in 342 U. S. 926.

Also *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, affirmed in 189 F. 2d 797; *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 215 F. 2d 167, certiorari denied January 10, 1955, ___ U. S. ___, 99 L. ed. Advance p. 207, and *Westway Theatre, Inc. v. 20th Century Fox Film Corp.*, 30 F. Supp., 830, affirmed 113 F. 2d 932, conclusively demonstrate that the courts have not abandoned the requirement of evidence to support a charge of wrongdoing.

The distributors of film product are engaged in a private enterprise. They are not public utilities which must sell their product to all who ask for it. Each distributor has the right to decide with whom it will deal and to determine for itself what in its judgment will best serve its business interests so long as it does not act contrary to law. *Lorain Journal Co. v. United States*, 342 U. S. 143; *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 86 F. Supp. 716, 725, affirmed 190 F. 2d 951, certiorari denied 342 U. S. 926; *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F. 2d 797, 798; *Westway Theatre, Inc. v. 20th Century Fox Film Corp.*, 30 F. Supp. 830, 836, affirmed 113 F. 2d 932.

That the Regent was an old and satisfactory customer of each of the distributor-respondents is uncontroverted (R. I, pp. 62a, 112a-113a; R. II, pp. 77a, 130a, 223a-224a, 249a-250a). It is also uncontroverted that each of the distributor-respondents pursued the sound business policy of trying to retain and continue relations with exhibitors with whom it had had a history of satisfactory dealing in the past. The continuation of this policy and the reasonableness of continuing to deal with the Regent is not to be judged by the experience which the Moreland may have

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had in grossing on an outstanding picture or two here and there during its history. Business judgment and business policy are entitled to be based upon the day-in and day-out operations and experience of the exhibitor in conducting a successful motion picture theatre.

As was stated by the Court in *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396, affirmed by the Court of Appeals at 189 F. 2d 797:

> "Two theatres directly across the street from each other were in active competition. Each distributor had to do business with one or the other on first availability of pictures in the zone. Some of the eight major distributors preferred to do business with the plaintiff, but the majority preferred to continue their long previously satisfactory business with the defendants. In doing so they exercised what I understand still to be clearly their undoubted and important right to select their customers."

In *Dipson Theatres, Inc. v. Buffalo Theatres,* 190 F. 2d 951, 956, certiorari denied 342 U. S. 926, it was stated:

> "In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre."

Continuity of place of exhibition as well as continuity of business dealings are a self-evident advantage not only to the distributor and to the exhibitor, but also to the public served by them both. *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 92, affirmed by the Court of Appeals 215 F. 2d 167, certiorari denied January 10, 1955, ____ U. S. ____, 99 L. ed. Advance p. 207.

The District Court in the case at bar followed the law as enunciated by this Court. As the District Court stated:

> "The real controversy in this case is factual rather than legal in nature, and the existence or non-existence of an unlawful conspiracy and the extent to which it produced the alleged damages must be resolved on the basis of the facts adduced." (R. I, p. 146a.)

On the basis of the facts adduced, the District Court sitting as a jury and having heard all of the evidence found that the petitioner had failed to sustain the allegations of its complaint and that there was in fact no conspiracy nor any monopoly. This is analogous to the situation decided by this Court in *Theatre Enterprises, Inc., v. Paramount Film Distributing Corporation,* 346 U. S. 537 where this Court held:

> "Here each of the respondents has denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house * * *. This evidence, together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury."

In the case at bar, the respondents denied the existence of any conspiracy and the existence of any monopoly power and in addition there was positive evidence introduced concerning the local conditions which were responsible for the lack of success of the Moreland and the reasons why the distributor-respondents continued to license their product to the Regent on a run ahead of the Moreland. Among this great mass of evidence was the fact that the Moreland was inferior to the Regent in its appointments, facilities, attractiveness and comfort to patrons throughout at least the period since 1940 and this was so

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found by the Court in Finding No. 73 (R. I, p. 178a). The fact that two theatres such as the Moreland and Regent could not be operated successfully in the same neighborhood in close proximity to each other, was the usual experience of most of the neighborhoods in the Greater Cleveland area almost without exception (R. I, p. 21a; R. II, pp. 97a, 358a-359a, 368a-369a, 371a-374a, 379a). On the basis of the evidence, the Court found that the neighborhood was not large enough to support two theatres of the size of the Regent and the Moreland from the time the Moreland was built in 1927 (Finding No. 77, R. I, p. 179a).

Throughout its entire existence, the Moreland was typed as an operation without a steady policy, closed completely for long periods of time, at other periods opened only part time and used for many purposes other than the exhibition of English language pictures. Throughout practically its entire history, the Moreland had the policy of showing foreign language pictures on at least two days a week. This typed it as a foreign language theatre as contrasted to a theatre showing English language films. The Moreland from its inception was a losing proposition even when it was operated under the aegis of Universal, one of the major picture companies (R. II, pp. 368a, 370a). As the District Court stated in its opinion:

> "From the time of its original opening, the Moreland distinguished itself by nothing but a marked inability to attract patronage." (R. I, p. 158a.)

In 1949 and 1950, one of the worst periods in the entire history of the motion picture industry set in. Many theatres throughout the nation and throughout the Cleveland area were compelled by lack of business to close their doors, including a theatre operated by respondent Gusdanovic and many theatres which employed Cooperative (R. II, pp. 147a, 309a-310a, 375a). This period of wide-

spread closing of motion picture theatres was found as a fact on the evidence by the District Court in Finding No. 76 (R. I, p. 179a).

Upon all of the evidence, the District Court sitting as a jury found that there had been no conspiracy and no monopoly (Findings Nos. 80, 81, 82, 83, 85, R. I, p. 180a).

CONCLUSION.

The decision of the District Court is based upon the evidence adduced at the trial and is in entire accord with the applicable decisions of this Court. The only questions in this case were factual ones. No important question of law is in controversy.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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